

JUN 15 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

THEODORE HERRERA, SR.,

Plaintiff - Appellant,

v.

D. K. BUTLER, Warden,

Respondent - Appellee.

No. 04-17211

D.C. No. CV-03-04333-VRW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Submitted June 13, 2006^{**}
San Francisco, California

Before: RYMER, T.G. NELSON, and W. FLETCHER, Circuit Judges.

Petitioner Theodore Herrera contends that the district court erroneously dismissed his first petition for a writ of habeas corpus, and that either equitable

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

tolling or relation back saves his second petition, which he filed over a year and a half after the dismissal of the first one, from dismissal under 28 U.S.C. § 2244(d).

We hold that equitable tolling is unavailable because Herrera did not pursue his rights diligently. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418-19 (2005); *Guillory v. Roe*, 329 F.3d 1015, 1018 (9th Cir. 2003) (as amended). For the same reason, undue delay, Herrera's second petition does not relate back to his first petition. *See Anthony v. Cambra*, 236 F.3d 568, 577 (9th Cir. 2000) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

AFFIRMED.